Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

BLANCHE RANDOLPH, as conservator of DEBORAH RANDOLPH,

Petitioner,

vs.

AL CERVANTES, MARY PHILLIPS, individually and in their official capacity as employees of PINE BELT REGIONAL MENTAL HEALTH CENTER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is there is a constitutional duty to protect non-institutionalized mentally ill persons from themselves?

II. Does a chronically mentally ill person have a constitutional right to a safe and humane living environment and adequate medical care when state actors knowingly place a person in danger for their foreseeable injuries under the state-created danger theory?

III. Does a chronically mentally ill person have a constitutional right to a safe and humane living environment and adequate medical care while residing in housing of a quasi-state mental health facility?

IV. Whether or not the chronically mentally ill can voluntarily enter into a lease, waiving their constitutional rights?

V. Is there a constitutional duty on the individual states to provide basic governmental services and a corresponding affirmative duty of care for their respective citizens?

VI. Whether the Fifth Circuit is correct or should be reversed for upholding the United States District Court's opinion denying Plaintiff's Motion for Summary Judgment and granting the Defendants Motion for Summary Judgment?

LIST OF PARTIES

Blanche Randolph, as conservator of Deborah Randolph, Petitioner.

The following parties who appeared in the Court of Appeals for the Fifth Circuit are also Respondents in this proceeding:

Al Cervantes, Individually and in His Official Capacity as Employee of Pine Belt Regional Mental Health Center; Mary Phillips, Individually and in Her Official Capacity as Employee of Pine Belt Regional Mental Health Center; Charles Main, Individually and in His Official Capacity as Executive Director of Pine Belt Mental Health Center; Pine Belt Mental Health Center; Jane Doe I, Jane Doe II and Jane Doe III, Individually and in Their Official Capacity as Employees of Pine Belt Mental Health Center, Pine Belt Mental Health Center; James T. Crane, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Jack D. Triggs, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Greg Breland, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Joe B. Thompson, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Ray Humphreys, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Lela Buckley, Individually and in Her Official Capacity as Commissioner of Region Twelve Mental Health Commission; Alfred Lott, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Kathy Evans, Individually and in Her Official Capacity as Commissioner of Region Twelve Mental Health Commission; and Region Twelve Mental Health Commission, a Body Politic.

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Blanche Randolph, as conservator of Deborah Randolph respectively prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 22, 1997, and whose Petition for Rehearing and Rehearing En Banc was denied in order to resolve the conflict between the other Circuits and the Fifth Circuit Court of Appeals, and that the United States Court of Appeals for the Fifth Circuit has decided important questions of law that have not been, but should be, settled by this Court.

OPINION BELOW

It is the opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition, *Randolph v. Cervantes,* 130 F.3d 727 (5th Cir. 1997). The Petition for Rehearing and Suggestion for Rehearing En Banc were denied on March 16, 1998.

STATEMENT OF JURISDICTION

On December 30, 1996, the United States District Court for the Southern District of Mississippi, Hattiesburg Division issued a Memorandum Opinion and Order and Judgment granting Al Cervantes, *et. al.* Motion for Summary Judgment and denying Blanche Randolph as conservator of Deborah Randolph's motion for summary judgment. On January 15, 1997, Blanche Randolph filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit, which affirmed in an opinion filed on December 22, 1997. A Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed and was denied on March 16, 1998. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this court is pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Facts and Claims Asserted

The Conservator's ward, Deborah Randolph, a black female, was permanently and totally blinded as a result of her own actions when she injected both of her eyes with insulin. The insulin and syringe were found and used by Deborah Randolph at the apartment of her neighbor, a Pine Hill Apartments resident. Pine Hill Apartments is an entity owned and operated by Pine Belt Mental Health Center (Pine Belt) in Hattiesburg, Mississippi. Pine Belt is a quasi-state mental health facility as found by the United States District Court which is now Pine Belt Mental Health Care Resources due to a name change.

Deborah Randolph, prior to the sanity hearing of December 11, 1991, had been committed to various Mississippi state mental hospitals on at least nine separate occasions due to her chronic

paranoid schizophrenia. It was only after Deborah Randolph set fire to her mother's mobile home that Deborah's mother, Blanche Randolph, refused to allow Deborah Randolph to live with her, and once again initiated involuntary commitment proceedings against Deborah Randolph in the Forrest County, Mississippi Chancery Court.

As a result of Blanche Randolph's filing involuntary commitment proceedings and pursuant to the subsequently issued Writ by the Chancery Court of Forrest County, the Sheriff's office of Forrest County took Deborah Randolph into custody and delivered her to Forrest General Hospital for mental examinations and later delivered her to the hearing.

At the last involuntary commitment hearing, held in Forrest County Chancery Court on December 11, 1991, both a psychiatrist and psychologist testified that Deborah Randolph was a threat to herself and others, and that she exhibited grossly disturbed behavior and faulty perception, and failed to provide necessary care for herself, and sought her to be immediately involuntarily placed in a state mental hospital. Al Cervantes, a counselor for Pine Belt, convinced the Court that she only needed outpatient treatment. His argument to the Chancery Court was based on the fact that Deborah Randolph had been treated at Pine Belt, off and on, for years prior to this incident, and they were familiar with her medical history. The Court, relying on his testimony, ordered Deborah Randolph to undergo outpatient treatment at Pine Belt Mental Health Center under the supervision of Al Cervantes.

The Special Master found in the Chancery Court order that the Respondent has recently threatened/attempted to physically harm himself/others or has recently failed to care for himself and by clear and convincing evidence, is a mentally ill person who poses a substantial likelihood of physical harm to himself (others).

Pursuant to this Court Order, Pine Belt and its employees did take care of Deborah Randolph on an outpatient basis, caring for her mental illness and personal needs. Additionally, they received her Social Security checks and handled her monetary responsibilities. Further, they transported her to and from the grocery store, helped her with housing, and after being evicted for failure to follow the rules from a low-income apartment, they convinced her to move to Pine Hill Apartments. It was well known to the staff at Pine Belt that Deborah had "limited insight", "hallucinations", and had attempted and/or threatened suicide and self-mutilation on many occasions prior to August 18, 1992. On or about August 18, 1992, Deborah Randolph self-injected insulin into her eyes from a syringe she found in her neighbor's apartment resulting in total and permanent blindness.

B. Course of Proceedings and Disposition Below

The Complaint filed by Blanche Randolph, as Conservator of Deborah Randolph, alleged violations of 42 U.S.C. § 1983 and Deborah Randolph's constitutional rights afforded her under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution for Pine Belt's failure to provide Plaintiff with reasonably safe living conditions, adequate medical care, and failure to adequately train and supervise its employees.

On December 30, 1996, the District Court, Honorable Charles W. Pickering, Sr., entered a Memorandum Opinion and Order and Judgment granting the Defendants Motion for Summary Judgment and denying the Plaintiff's Motion for Summary Judgment.

On December 22, 1997, the Fifth Circuit Court of Appeals, Judge Magill, sitting by designation, entered a Memorandum Opinion and Order upholding the District Court's granting of summary judgment against the Plaintiff-Appellant.

REASONS FOR GRANTING THE WRIT

(1) The Fifth Circuit Court of Appeals failed to recognize a constitutional duty for Quasi-State institutions to protect mentally ill persons from themselves resulting in a conflict between the circuits.

(2) The Fifth Circuit Court of Appeals refusal to recognize the state-created danger theory results in a conflict between the circuits.

(3) In order to clarify and expand *DeShaney v. Winnebago Cnty. Dept of Social Services* and *Youngberg v. Romeo*, this Court needs to decide does a chronically mentally ill person have a constitutional right to a safe and humane living environment and adequate medical care while in housing of a quasi-state mental health facility?

(4) The Fifth Circuit Court of Appeals holding that Deborah Randolph "voluntarily" entered into a lease agreement is in conflict with the Eleventh Circuit Court of Appeals opinion in *Burch v. Apalachee Community Mental Health Service.*

I.

THE FIFTH CIRCUIT COURT OF APPEALS FAILED TO RECOGNIZE A CONSTITUTIONAL DUTY FOR QUASI-STATE INSTITUTIONS TO PROTECT MENTALLY ILL PERSONS FROM THEMSELVES RESULTING IN A CONFLICT BETWEEN THE CIRCUITS.

The First, Second, Seventh and Eighth Circuits have held that this constitutional duty exists. *Goodman v. Parwatikar*, 570 F.2d 801, 804 (8th Cir. 1978) (stating once Rachel was admitted

as a patient, voluntary or involuntary, she had a constitutional right to a basically safe and humane living environment.)

In *Harper v. Cserr*, 544 F.2d 1121 (1st Cir. 1976), the court speculated that a voluntary mental patient's husband might possibly have a constitutional claim against state officials for failure to have prevented the patient's suicide, if he could establish "a sufficient combination of helplessness on the part of the deceased, and wanton callousness on the part of those caring for her." 544 F.2d at 1124. The court observed that the rationale applicable to involuntarily committed patients might possibly apply to some voluntary mental patients because, "depending on their degree of disability, the availability of other resources and of parents, spouses, friends and guardians, voluntary patients may or may not be compelled de facto to endure the conditions at a state facility."

In *K. H., through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), it is stated that "[o]nce the State assumes custody of a person, it owes him a rudimentary duty of safekeeping, no matter how perilous his circumstances when he was free".

In *McCartney v. Barg*, 643 F. Supp. 1181 (N.D. Ohio 1986) that court stated that

> [c]ases illustrate the policy and practical considerations which minimize, if not completely eliminate, the distinction between a resident of a mental institution who is voluntarily or involuntarily committed when due process rights are at issue. This is especially true in the instant case, where Plaintiff is alleged to be a retarded and mentally ill individual who has been institutionalized since she was ten years old. It is highly unlikely that the Plaintiff, either at the time of her initial admission, or throughout her journey through the Ohio mental health system, had the capacity to choose voluntarily any reasoned course.

This constitutional duty was also upheld in *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239 (2nd Cir. 1984), wherein the Suffolk Developmental Center, which was a state operated school for the mentally retarded, was held to owe a duty to safe conditions for its residents.

In *Youngberg v. Romeo,* 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982) this Court cited Judge Seitz of the United States Courts of Appeal for the Third Circuit in his language stating,

> I believe that the Plaintiff has a constitutional right to minimally adequate care and treatment. The existence of a constitutional right to care and treatment is no longer a novel legal proposition.

Youngberg, 73 L. Ed. 2d at 39.

Additionally, in Youngberg, this Court also said,

> . . . we agree with his view . . .
>
> We repeat that the State concedes a duty to provide adequate food, shelter, clothing, and medical care. These are the essentials of the care that the State must provide. The State also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution.

Youngberg, 73 L. Ed. 2d at 42.

Clearly by the failing to recognize a constitutional duty to the mentally ill who have been placed by Court Order into outpatient treatment and subsequent housing of the quasi-state agency, such as Pine Belt, the Fifth Circuit Court of Appeals is in opposition to this Courts prior ruling in *Youngberg v. Romeo*, 457 U.S. 307,

73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982) and the constitutional duty recognized by the other circuits.

This Court should grant this Writ of Certiorari in order to determine if there is a constitutional duty to provide reasonable safety and medical care to a non-institutionalized chronically mentally ill patient such as Deborah Randolph under these facts and to resolve the conflict between the circuits.

II.

THE FIFTH CIRCUIT COURT OF APPEALS REFUSAL TO RECOGNIZE THE STATE-CREATED DANGER THEORY RESULTS IN A CONFLICT BETWEEN THE CIRCUITS.

The Fifth Circuit has refused to recognize the state-created danger theory.

The First, Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits on the other hand have recognized the state created danger test resulting in a conflict between the circuits.

Although consistently refusing to adopt the state-created danger theory, the Fifth Circuit recognizes the elements of the test for the state-created danger theory as set forth by the other circuits in *Johnson v. Dallas Independent School Dist.*, 38 F.3d 198 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017, 115 S. Ct. 1361, 131 L. Ed. 2d 218 (1995)

> Although different facts underlie each of these cases, the courts uniformly held that state actors may be liable if they created the plaintiffs' peril, increased their risk of harm, or acted to render them more vulnerable to danger.

Other circuits have adopted this theory in various cases concerning various degrees of state access and control. In *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990), a police officer arrested a drunken driver and impounded his car, leaving the female passenger alone at night, without any means to go home, in a neighborhood known for criminal activity. She was raped by a stranger who offered her a lift. In *Cornelius v. Town of Highland Lake, Ala*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990), the state permitted a prisoner with a violent criminal history to participate in a work program at a municipal town hall under the supervision of an untrained city employee. He gained access to a knife, abducted the plaintiff who worked for the city, and held her hostage for three days.

Penilla v. City of Huntington Park, 115 F.3d 707 (9th Cir. 1997), (police officers cancel paramedics for person who broke into residence and fled resulting in the death of Penilla) *Kneipp v. Tedder*, 95 F.3d 1199, 1208-11 (3rd Cir. 1996) (finding that DeShaney does not bar section 1983 claim where police officers' interference rendered intoxicated plaintiff more vulnerable to harm); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993) (reading DeShaney to imply that if police officers in some way assisted in creating or increasing danger, due process rights would be implicated); *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993), *cert. denied*, 510 U.S. 947, 114 S. Ct. 389, 126 L. Ed. 2d 337 (1993) (stating that "DeShaney . . . leaves the door open for liability situations where the state creates a dangerous situation or renders citizens more vulnerable to danger"); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990) (concluding that DeShaney does not bar section 1983 claim where injury by private actor was also result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community with such interference increasing vulnerability of [the victim] to the actions of [the private individual]).

The Fifth Circuit in contrast refused to recognize and adopt the state-created danger theory in *Johnson v. Dallas Independent School District*, 38 F.3d, 198 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017, 115 S. Ct. 1361, 131 L. Ed. 2d 218 (1995); *Leffall v. Dallas Independent School Dist.*, 28 F.3d 521, 531 (5th Cir. 1994); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997); *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995) and in this case. This Court needs to resolve the conflict between the Fifth Circuit and the other circuits concerning the state-created danger theory.

III.

IN ORDER TO CLARIFY AND EXPAND *DESHANEY v. WINNEBAGO CNTY DEPT OF SOCIAL SERVICES* AND *YOUNGBERG v. ROMEO*, THIS COURT NEEDS TO DECIDE DOES A CHRONICALLY MENTALLY ILL PERSON HAVE A CONSTITUTIONAL RIGHT TO A SAFE AND HUMANE LIVING ENVIRONMENT AND ADEQUATE MEDICAL CARE WHILE IN HOUSING OF A QUASI-STATE MENTAL HEALTH FACILITY?

In *DeShaney v. Winnebago Cnty, Dept. of Social Ser.*, 489 U.S. 189, 200, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) this Court held that a four-year-old boy, who was severely beaten at home by his natural father after the County Department of Social Services had failed to intervene to protect the young boy against the risk of violence did not violate the Due Process Clause of the United States Constitution.

This Court stated,

> In the substantive due process analysis it is the State's act of restraining the individual's freedom to act on his own behalf, incarceration, institutionalization, *or other*

> *similar restraint of personal liberty — which is the "deprivation of liberty" triggering the protection of the Due Process Clause.*

DeShaney v. Winnebago Cnty, Dept. of Social Ser., 489 U.S. 189, 200, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). (emphasis added).

This Court held that

> when persons are involuntarily committed to a mental institution and, thus, completely depending on the state, the state has a duty to provide such patients with certain services and care as are necessary for their "reasonable safety" from themselves and others.

Youngberg v. Romeo, 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982).

Clearly the "special relationship", if necessary, as set forth in *DeShaney* existed in this case. Deborah Randolph was under a Court order to undergo treatment with Pine Belt. Pine Belt undertook to provide her with transportation, housing, assistance and/or control of her financial affairs and ultimately shelter. She was, under the circumstances the de facto ward of Pine Belt, if not an actual ward due to the Court Order. She relied on all the counselors, particularly Al Cervantes, Marilyn Williams, and others, together with the medical staff at Pine Belt to provide for her needs.

The *DeShaney* decision further held that

> The rationale for this principle is simple enough: when the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him

> unable to care for himself, and at the same time fails to provide for his basic human needs — e.g. food, clothing, shelter, medical care and reasonable safety — its transgresses the substantive limits on state action set by the Eighth Amendment and the "Due Process Clause."

DeShaney, 103 L. Ed. 2d at 261-262.

Indeed, the dissent by Justice Brennan in *DeShaney* would go even further, stating

> Moreover, to the Court, the only fact that seems to count as an "affirmative act of restraining the individual's freedom to act on his own behalf" is direct physical control. *Ante*, at 200, 103 L. Ed. 2d, at 262 (listing only "incarceration, institutionalization, and other similar restraining of personal liberty" in describing relevant "affirmative acts"). *I would not, however, give Youngberg (489 U.S. 207) and Estelle such a stingy scope. I would recognize, as the Court apparently cannot, that "the State's knowledge of an individual's predicament and its expressions of intent to help him" can amount to a "limitation . . . on his freedom to act on his own behalf" or to obtain help from others. Ante, at 200, 103 L. Ed. 2d, at 262. Thus, I would read Youngberg and Estelle to stand for the much more generous proposition that, if a state cuts off private sources of aid then refuses aid itself, it cannot wash its hands of the harm that results from its inaction.*

DeShaney, 103 L. Ed. 2d at 266. (Emphasis added).

As the footnote in *DeShaney* says,

> [*h*]*ad the State, by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.*

DeShaney, 103 L. Ed. 2d at 262. (emphasis added).

In its opinion below, the Fifth Circuit Court of Appeals reliance on *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 992 (1st Cir. 1992) is misplaced, as the First Circuit stated

> Monahan, in the complaint alleged, Mohahan voluntarily committed himself to the care and custody of DMH and Millie's cottage. Because the state did not commit Monahan involuntarily, it did not take an "affirmative act" of restraining his liberty, an act which may trigger a corresponding due process duty to assume a special responsibility for his protection.

The Seventh Circuit Court of Appeals in *Estate of Stevens v. City of Green Bay,* 105 F.3d 1169 (7th Cir. 1997), stated the situations in which this Court has recognized such a "special relationship" as follows:

> (1) custodial settings in which the state has limited the individual's ability to care for himself, and (2) when the state affirmatively places the individual in a position of danger the individual would not have otherwise faced.

The Petitioner would urge this Court to grant the Writ of Certiorari to determine, whether or not, the State did, by the affirmative exercise of its power, remove Deborah Randolph from free society and place her in a situation of outpatient care and treatment by Pine Belt and that Pine Belt's decision, and through exercising its authority under the Order, to house her in its own apartment complex is sufficiently analogous to institutionalization to give rise to an affirmative duty to protect under the Due Process Clause of the United States Constitution.

IV.

THE FIFTH CIRCUIT COURT OF APPEALS HOLDING THAT DEBORAH RANDOLPH "VOLUNTARILY" ENTERED INTO A LEASE AGREEMENT IS IN CONFLICT WITH THE ELEVENTH CIRCUIT COURT OF APPEALS OPINION IN *BURCH v. APALACHEE COMMUNITY MENTAL HEALTH SERVICE.*

This Court stated in *Zinermon v. Burch,* 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990).

> The very nature of mental illness makes it foreseeable for a person needing mental health care to be unable to understand any proper explanation and disclosure of the subject matter of the forms that person is asked to sign, and will be unable to make a knowingly and willful decision whether to consent to an admission. . . . It is hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent.

Zinermon, 108 L. Ed. 2d at 119.

The Fifth Circuit, by holding that Deborah Randolph "voluntarily" entered into a lease agreement, ignores the facts of

mental illness and the patient's inability to make rational, knowing decisions and therefore her inability to give informed consent given her chronic mental illness.

In Burch v. Apalachee Community Mental Health Serv., 840 F.2d 797 (11th Cir. 1988), the court held that a valid due process claim was upheld when it determined that Burch could not voluntarily admit himself to the facility due to his psychotic appearance and his diagnosis of paranoid schizophrenia. The court further found that Burch was heavily medicated and disoriented on admission, and concluded that Burch was probably not competent to be signing legal documents.

Here, Deborah Randolph was diagnosed as paranoid schizophrenic, had been admitted to state mental hospitals repeatedly and recently had been urged to be involuntarily committed by a psychiatrist and psychologist. There is no evidence that she signed a lease or any other legal documents voluntarily and knowingly, but rather did as she was told by the staff at Pine Belt.

The Fifth Circuit's opinion in this case is contrary to the Eleventh Circuit's opinion in *Burch v. Apalachee Community Mental Health Service, supra*, in that here the Fifth Circuit held that she was a "voluntary" tenant due to her signing the lease agreement even though she had no mental capacity to make a rational, knowing and comprehending decision in signing the lease. How can one who has been hallucinating and hearing voices give her informed consent to a lease agreement as held by the Fifth Circuit Court of Appeals?

Clearly the Eleventh Circuit and Fifth Circuit are in conflict in their opinions and this Court should grant Certiorari in order to issue a definitive opinion on this question as to whether or not a chronically mentally ill person can voluntarily enter into a lease agreement waiving her due process rights.

CONCLUSION

The Fifth Circuit's opinion is in conflict with the other circuits in many different ways. This Court should exercise its power to resolve these conflicts, decide this precedent setting decision, further clarify and expand *DeShaney* and *Youngberg*, address the constitutional questions raised and remedy the Fifth Circuit's errors.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED DECEMBER 22, 1997

Blanche RANDOLPH, as Conservator of Deborah Randolph, Plaintiff-Appellant,

v.

Al CERVANTES, Individually and in His Official Capacity as Employee of Pine Belt Mental Health Center; Mary Phillips, In Her Official Capacity as Employee of Pine Belt Mental Health Center; Charles Main, Individually and in His Official Capacity as Executive Director of Pine Belt Mental Health Center; Pine Belt Mental Health Center; James T. Crane, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Jack D. Triggs, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Greg Breland, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Joe B. Thompson, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Ray Humphreys, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Lela Buckley, Individually and in Her Official Capacity as Commissioner of Region Twelve Mental Health Commission; Alfred Lott, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; Kathy Evans, Individually and in Her Official Capacity as Commissioner of Region Twelve Mental Health Commission; and Region Twelve Mental Health Commission, a Body Politic, Defendants-Appellees.

Appendix A

No. 97-60035.

United States Court of Appeals,
Fifth Circuit.

Dec. 22, 1997.

* * *

Appeal from the United States District Court for the Southern District of Mississippi.

Before MAGILL,* SMITH and DeMOSS, Circuit Judges.

MAGILL, Circuit Judge:

This 42 U.S.C. § 1983 *DeShaney* claim is on appeal from the district court's grant of summary judgment in favor of the state-actor defendants. The law being settled in this Circuit, we affirm.

I.

Pine Belt Mental Health Center (Pine Belt) serves patients located in Mississippi's Region XII, a geographic region including nine counties. In addition, Pine Belt owns and operates Pine Hill Apartments, an apartment complex, and leases units in the complex to patients enrolled in Pine Belt's transitional living program.

Between 1978 and 1991, Deborah Randolph was committed to various Mississippi state mental hospitals on at least nine separate occasions. In December 1991, after Randolph allegedly

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* Circuit Judge of the Eighth Circuit, sitting by designation.

set fire to her mother's mobile home, Randolph's mother refused to allow Randolph to live with her and again initiated involuntary commitment proceedings against Randolph.

On December 11, 1991, the Forrest County Chancery Court conducted a sanity hearing for Randolph. Al Cervantes, one of Pine Belt's caseworkers, testified that Randolph could remain in the community and did not need to be involuntarily hospitalized. After considering "[o]ut-patient care, day treatment in a hospital, night treatment in a hospital, home health services, and custodial placement with an individual, and others . . . *as alternatives to institutionalization*," I J.A. at 51 (emphasis added), the Chancery Court released Randolph on her own recognizance and ordered Randolph to attend out-patient treatment at Pine Belt under Cervantes's supervision.

After being released on her own recognizance, Randolph executed a lease for her own government-subsidized apartment. She resided at the apartment until June 1992, when she was evicted for failing to comply with her rent agreement.

Cervantes then helped Randolph apply for residence at Pine Hill Apartments. On July 1, 1992, Randolph executed a lease with Pine Belt for a unit at Pine Hill Apartments. The lease required Randolph to abide by Pine Hill Apartments's rules and to participate in various programs sponsored by Pine Belt. The lease also provided that either Randolph or Pine Belt could terminate the lease upon thirty days written notice. Randolph's residence at Pine Hill Apartments was voluntary, and Randolph at all times retained the right to come and go from her unit and Pine Hill Apartments at will.

On August 18, 1992, Randolph found a used insulin syringe in a diabetic neighbor's garbage receptacle. Randolph then injected

some of that neighbor's insulin into each of her own eyes. Despite emergency surgery, Randolph lost one eye entirely and retained only limited light perception in her other eye.

Randolph's mother, acting as Randolph's conservator, filed suit under 42 U.S.C. § 1983 against the Region XII commissioners, Pine Belt, Pine Belt's executive director, and two Pine Belt employees (collectively, the defendants), asserting that Randolph's Fourteenth Amendment due process rights were violated while she was residing at Pine Hill Apartments because the defendants did not prevent Randolph from injuring herself. The district court granted summary judgment to the defendants on the basis that the defendants did not have a constitutional duty to protect Randolph from her self-inflicted injuries. Randolph's mother appeals.

II.

We review the district court's grant of summary judgment de novo and examine the evidence in the light most favorable to the nonmoving party. *See Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996, 997 (5th Cir.1992).

To state a claim under 42 U.S.C. § 1983, "a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir.1994).[1] In this case, Randolph's mother alleges that the defendants had a constitutional duty to protect Randolph from her self-inflicted injuries because either (1) a "special relationship"

1. We assume, without deciding, that Pine Belt is a state actor subject to potential liability under § 1983.

existed between Randolph and the defendants or (2) the defendants created the danger that befell Randolph. We disagree.

A.

The Due Process Clause of the Fourteenth Amendment confers upon an individual the right to be free of state-occasioned damage to her bodily integrity, not the entitlement to governmental protection from injuries caused by non-state actors. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196-97, 109 S.Ct. 998, 1003-04, 103 L.Ed.2d 249 (1989); *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir.1995) (en banc). Thus, as a general rule, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197, 109 S.Ct. at 1004.

The Supreme Court has recognized an exception to this general rule where a special relationship exists between the state and the individual. *See id.* at 199-200, 109 S.Ct. at 1005-06. Particularly, the Supreme Court has explained that a state may have the constitutional duty to protect an individual from private violence if the state, "through incarceration, institutionalization, or other similar restraint of personal liberty," has limited the individual's freedom to act on her own behalf. *Id.* at 200, 109 S.Ct. at 1006. This Court has explained, however, that the *DeShaney* special relationship exists "only when the state, by its affirmative exercise of power, has custody over an individual *involuntarily or against his will. . . .*" *Walton*, 44 F.3d at 1303. "Absent this 'special relationship,' the state has no duty to protect nor liability from failing to protect a person under the due process clause of the Fourteenth Amendment from violence at the hands of a private actor." *Id.* at 1306.

In this case, Randolph was not involuntarily confined against her will when she resided at Pine Hill Apartments. The Chancery Court released Randolph on her own recognizance and only ordered her to obtain *out-patient* treatment from Pine Belt. Randolph voluntarily entered into the lease with Pine Belt and became Pine Belt's tenant. While Randolph's lease at Pine Hill Apartments required her to attend various Pine Belt programs, the lease also specifically enabled Randolph to terminate the lease upon thirty days written notice. Moreover, Randolph was free to come and go from Pine Hill Apartments at any time.

Randolph's mother further contends that a "special relationship" existed between Randolph and the defendants because Randolph's mental condition made Randolph compliant with Cervantes's suggestions and reliant on Cervantes's and Pine Belt's care and services. However, the mere fact that Randolph's mental condition may have made her functionally dependant on Pine Belt and Cervantes does not transform her voluntary tenancy at Pine Hill Apartments into an involuntary confinement creating a "special relationship." *See Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 992 (1st Cir.1992) (finding no special relationship where the mental patient's dependency on his caretakers resulted from his own mental condition and where "[h]is helplessness was not attributable to the state's having taken him into custody involuntarily").

In this case, the defendants never took the affirmative step of restraining Randolph's liberty so that she was rendered unable to care for herself, and the defendants never held her involuntarily or against her will. Accordingly, a "special relationship" did not exist between Randolph and the defendants.

B.

The state-created danger theory has not been adopted in this Circuit. *See Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir.1997) (en banc); *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir.1995). However, even if we were to adopt this theory, Randolph's mother could not recover. To prevail under the state-created danger theory, "[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir.1994). "The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid." *Id.* (quotations and citation omitted). Viewing the evidence in the light most favorable to Randolph's mother, the defendants allowed and encouraged Randolph to voluntarily reside at Pine Hill Apartments as a tenant having the right to come and go from the premises at any time and having the right to cancel her lease. This will not trigger a duty under the state-created danger theory, even if we were to adopt such a theory.

III.

For the foregoing reasons, the district court's grant of summary judgment is affirmed.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, HATTIESBURG DIVISION FILED DECEMBER 30, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CIVIL ACTION NO. 2:95-CV-259PG

BLANCHE RANDOLPH, AS CONSERVATOR OF DEBORAH RANDOLPH

PLAINTIFF

VERSUS

AL CERVANTES, PINE BELT MENTAL HEALTH CENTER, ET AL

DEFENDANTS

MEMORANDUM OPINION AND ORDER

This cause is before the Court on Cross Motions for Summary Judgment. The Court, having reviewed the motions, the briefs of the parties, the authorities cited and being otherwise fully advised in the premises, finds as follows to-wit:

FACTUAL BACKGROUND

Deborah Randolph was diagnosed as a paranoid schizophrenic in 1978 at the age of 17 years. Prior to the incident which gave rise to the instant litigation, Randolph was involuntarily committed to state mental hospitals on no less than nine occasions and she had a known history of violent and

self-destructive behavior. In December 1991 Deborah's mother, Blanche Randolph, again initiated involuntary commitment proceedings after Deborah allegedly set fire to her mother's mobile home, causing significant damage. Deborah's mother would not allow Deborah to reside with her after the incident of the fire. On December 11, 1991, the sanity hearing, initiated by Deborah's mother, was conducted in Forrest County Chancery Court. After considering all the testimony, including that of Pine Belt Mental Health Center caseworker Al Cervantes, the chancellor ordered Deborah to submit to outpatient treatment at Pine Belt Mental Health Center; said treatment was to be supervised by the above mentioned Cervantes.

Deborah Randolph was released on her own recognizance and took up residence at a Section 8 apartment on Florence Street. Deborah remained at that address until June 1992 when she was evicted for failing to comply with her rent agreement. Mr. Cervantes assisted Deborah in applying for residence at Pine Hill Apartments, a complex owned and operated by Pine Belt Mental Healthcare. Deborah's application was approved and she took up residence at Pine Hill in late June 1992. As a condition to approval of lease applications, all prospective Pine Hill residents must agree to abide by Pine Hill Apartments' rules and to participate in various programs sponsored by Pine Belt Mental Healthcare. Residence at Pine Hill is otherwise voluntary and either party to the lease agreement may terminate the lease by giving 30 days notice. Pine Belt Mental Healthcare provided counseling to Plaintiff, helped with her financial planning, helped her take her medication, provided transportation and other like assistance. Deborah also received social security disability benefits and SSI benefits. Since Deborah's mother felt she could not take care of her after the fire incident, Deborah was taken care of by various governmental or quasi-governmental programs.

Appendix B

On August 18, 1992 Deborah Randolph found a used syringe in a garbage receptacle utilized by a neighboring resident who was likewise being assisted by Pine Belt Mental Healthcare and who happened to be an insulin dependent diabetic. She took some of that neighbor's insulin and injected it into each of her eyes. Shortly thereafter, Deborah contacted Mr. Cervantes and complained of discomfort with her eyes. Mr. Cervantes responded to Deborah's complaint and visited her at the apartment complex. He noted that Deborah's eyes indeed appeared irritated, but Deborah responded negatively when questioned about whether she had done anything to her eyes. Cervantes assisted Ms. Randolph in washing out her eyes and left. He returned to check on Deborah later that day and again assisted her in bathing her eyes; he further decided that in the event the condition was no better by morning, he would escort her to a doctor. On the morning of August 19, 1992, Cervantes again visited Ms. Randolph and noted that her eye condition appeared to have worsened — Cervantes then drove Deborah to the emergency room. When questioned by the emergency room physician, Deborah confessed to having injected her eyes with insulin. Despite emergency surgery, Deborah lost one eye entirely and has only limited light perception in the second eye.

Deborah's mother, acting as conservator, filed the instant lawsuit in August 1995, alleging a violation of Deborah's right to substantive due process in violation of 42 U.S.C. § 1983 and seeking recovery of actual, compensatory, hedonic, punitive and exemplary damages. No conservator had ever been appointed for Deborah Randolph until her mother was appointed for the purpose of filing this lawsuit. This cause is now before the Court on each party's Motion for Summary Judgment on the issue of liability.

Appendix B

STANDARD OF REVIEW

The Federal Rules of Civil Procedure, Rule 56(c) authorizes summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corporation v. Catrett,* 477 U.S. 317, 322, 91 L.Ed.2d 265,106 S. Ct. 2548 (1986). The existence of a material question of fact is a question of law that the district court is bound to consider before granting summary judgment. *John v. State of La. (Bd. Of T. For State C. & U.),* 757 F.2d 698, 712 (5th Cir. 1985).

A Judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 91 L.Ed.2d 202, 106 S. Ct. 2505 (1986).

Although Rule 56 is peculiarly adapted to the disposition of legal questions, it is not limited to that role. *Professional Managers. Inc. v. Fawer. Brian, Hardy & Zatzkis,* 799 F.2d 218, 222 (5th Cir. 1986). "The mere existence of a disputed factual issue, therefore, does not foreclose summary judgment. The dispute must be genuine, and the facts must be material." *Id.* "With regard to 'materiality', only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment." *Phillips Oil Company v. OKC Corporation,* 812 F.2d 265, 272 (5th Cir. 1987).

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Where "the summary judgment evidence establishes that one of the essential elements of the plaintiff's cause of action does not exist as a matter of law, . . . all other contested issues of fact are rendered immaterial. *See Celotex,* 477 U.S. at 323,106 S. Ct. at 2552." *Topalian v. Ehrman*, 954 F.2d 1125, 1138 (5th Cir. 1992).

In making its determinations of fact on a motion for summary judgment, the Court must view the evidence submitted by the parties in the light most favorable to the nonmoving party. *McPherson v. Rankin,* 736 F.2d 175, 178 (5th Cir. 1984). The moving party has the duty to demonstrate the lack of a genuine issue of material fact and the appropriateness of judgment as a matter of law to prevail on its motion. *Union Planters Nat. Leasing v. Woods,* 687 F.2d 117 (5th Cir. 1982). The movant accomplishes this by informing the court of the basis of its motion, and by identifying portions of the record which highlight the absence of genuine factual issues. *Topalian,* 954 F.2d at 1131.

"Rule 56 contemplates a shifting burden: the nonmovant is under no obligation to respond unless the movant discharges [its] initial burden of demonstrating [entitlement to summary judgment.]" *John,* 757 F.2d at 708. "Summary judgment cannot be supported solely on the ground that [plaintiff] failed to respond to defendants' motion for summary judgment," even in light of a Local Rule of the court mandating such for failure to respond to an opposed motion. *Id.* at 709.

However, once a properly supported motion for summary judgment is presented, the nonmoving party must rebut with "significant probative" evidence. *Ferguson v. National Broadcasting Co. Inc.,* 584 F.2d 111, 114 (5th Cir. 1978). In other words, "the nonmoving litigant is required to bring forward 'significant probative evidence' demonstrating the existence of a

triable issue of fact." *In Re Municipal Bond Reporting Antitrust Lit.*, 672 F.2d 436, 440 (5th Cir. 1982). To defend against a proper summary judgment motion, one may not rely on mere denial of material facts nor on unsworn allegations in the pleadings or arguments and assertions in briefs or legal memoranda. The nonmoving party's response, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e), Fed.R.Civ.P. *See also, Union Planters Nat. Leasing v. Woods*, 687 F.2d at 119.

While generally "[t]he burden to discover a genuine issue of fact is not on [the] court," (*Topalian*, 954 F.2d at 1137), "Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention — the court must consider both before granting a summary judgment." *John*, 757 F.2d at 712, *quoting Keiser v. Coliseum Properties. Inc.*, 614 F.2d 406, 410 (5th Cir. 1980).

LEGAL ARGUMENTS

Plaintiff seeks recovery for an alleged constitutional violation pursuant to 42 U.S.C. § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

In order to recover, Ms. Randolph must prove deprivation of a right secured by the Constitution or laws of the United States and that the deprivation was a result of state action — i.e., conduct fairly attributable to the State. Plaintiff maintains that the record establishes all of these elements and thus seeks this Court's ruling in her favor on the issue of liability. Defendants, by contrast, contest all elements of the § 1983 action and would have this Court sustain their cross motion for summary judgment.

Based on the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services* and the Fifth Circuit's subsequent *en banc* opinion in *Walton v. Alexander,* it is the conclusion of this Court that Ms. Randolph's allegations do not come close to demonstrating a constitutional violation. 489 U.S. 189, 109 S. Ct. 998, 103 L.Ed.2d 249 (1989); 44 F.3d 1297 (5th Cir. 1995). The state involvement in *DeShaney* was about the same as in this case. State involvement in the *Walton* case in the opinion of this Court was considerably greater than the state involvement in the case at bar. The conduct in both of those cases was far more egregious than the conduct herein and in both of those instances, the Supreme Court and the Fifth Circuit respectively concluded that no cause of action was stated.

The *DeShaney* Court concluded that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 103 L. Ed. 2d at 259. The Court, after reciting the wording of the Due Process Clause which provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law,"[1] went on to note that

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1. *Id.* at 258.

> . . . nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. *The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.* It forbids the State itself to deprive individuals of life, liberty, or property, without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to insure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.

Id. at 258-59. (emphasis added). The *DeShaney* Court did recognize that in at least two types of situations the existence of a "special relationship" would impose affirmative duties on a state under the Due Process Clause to provide for the reasonable safety and well-being of certain individuals. Plaintiff relies on the existence of a "special relationship" as described in *DeShaney* to establish a duty on the part of the State of Mississippi to provide for her reasonable safety and well-being. Plaintiff argues that the State owed Deborah Randolph a duty to protect her from herself.

The Court in *DeShaney* found that "[i]n the substantive due process analysis, *it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the 'deprivation of liberty' triggering the protection of the Due Process Clause,* not its failure to act to protect his liberty interests against harms inflicted by other

means." *Id.* at 262 (footnote omitted)(emphasis added). Plaintiff argues that the circumstances in which she found herself at the time of her injury constituted a "similar restraint of personal liberty," thus making her the beneficiary of an affirmative duty of protection by the State of Mississippi under the Due Process Clause.

However, the Fifth Circuit's interpretation and application of *DeShaney* limits the aegis of a "special relationship" to instances "only when the state, by its affirmative exercise of power, has custody over an individual *involuntarily or against his will* . . . ." *Walton,* 44 F.3d at 1303 (emphasis in original). Notwithstanding Plaintiff's arguments to the contrary, this Court finds, as a matter of law, that the action of Pine Belt Mental Healthcare in attempting to assist Plaintiff so that she could live in the least restrictive environment possible without being institutionalized and the action of the Forrest County Chancery Court in ordering Ms. Randolph to undergo outpatient treatment at Pine Belt Mental Health Center is insufficient to give rise to a special relationship as defined in *DeShaney* which would have imposed an affirmative duty on the part of the State to provide for her safety.

While the chancery court's order operated to restrain Plaintiff's liberty to a certain extent, the limitation on her liberty was not so extensive as to render her unable to care for herself. Indeed, Plaintiff was released on her own recognizance following the sanity hearing on December 11, 1991. She lived on her own in the months after the chancellor's order. Her execution of an application for residence at Pine Hill Apartments was not involuntary in the sense that the State exercised force. Plaintiff avers only that "she had no other choice." With all deference, Plaintiff's lack of choice was a result of forces not related to the

State; rather, her lack of alternatives resulted from her illness and the effects thereof — not the affirmative exercise of the State's power. The acts of those associated with Pine Belt Mental Healthcare, if indeed said acts are fairly attributable to the state, fall into the category of beneficent acts on Plaintiff's behalf and are not of the character necessary to support Plaintiff's claim of a "special relationship" pursuant to *DeShaney*. Further, the Chancery Court's order only required Plaintiff to submit to outpatient treatment. The court order did not require Plaintiff to live at any particular place or to submit to any particular regimen.

While Plaintiff never directly addresses the issue, it seems that she may also be attempting to assert an additional argument under the "state created danger" theory. Plaintiff asserts at several points in her brief that the State's disregard for Ms. Randolph's safety was most obvious in its decision to place her with a roommate/neighbor who was an insulin dependent diabetic, thereby permitting Plaintiff access to the instrumentalities used to inflict her injuries. Although the Fifth Circuit has yet to recognize the state created danger doctrine, the facts of this case are insufficient to support recovery under that theory. In order to recover on the basis of a "state created danger", a plaintiff must demonstrate not only that "the state increased the danger of harm from third persons; the § 1983 plaintiff must also show that the state acted with the requisite culpability in failing to protect the plaintiff from that danger to make out a constitutional violation." *Leffall v. Dallas Independent School Dist.*, 28 F.3d 521, 531 (5th Cir. 1994). The standard for liability under the "state created danger" theory is that of "deliberate indifference." Assuming that the actions of those associated with Pine Belt Health Care and Pine Hills Apartments are sufficient to show state action, this Court is unconvinced that the acts or omissions which resulted in Deborah's having access to the instrumentalities she ultimately

used to inflict harm upon herself amount to anything more than negligence, if that. This Court is certainly not suggesting in any manner that Defendant was negligent under the facts of this case. What the Court is noting is that Plaintiff's allegations at most allege only negligence, not a constitutional deprivation.[2] Negligence even gross negligence, is insufficient to support a § 1983 claim predicated on the state created danger theory.[3] *Id.*

In *Walton* the Court noted that " 'Section 1983 imposes liability for violation of rights protected by the constitution, not for violations of duties of care arising out of tort law.' " 44 F. 2d at 1301 (citations omitted). The *Walton* Court went on to hold "the due process clause confers protection to the general public against unwarranted government interference, but it does not confer an entitlement to governmental aid. . ." *Id.* at 1302.

As indicated, Plaintiff's claim in essence is that under a substantive due process theory, irrespective of state tort law, the Defendants should have protected Plaintiff from her own actions. Plaintiff argues for an extension of constitutional law to impose a duty under the due process clause on those who operate

2. No issue of state tort law is before this Court.

3. In *Walton*, a panel of the Fifth Circuit concluded that under the *DeShaney* holding which mentioned "other similar restraint of personal liberty that a "special relationship" under the particular facts of that case did exist, but went on to hold that the standard of liability by which the conduct of the official involved should be judged was that of "deliberate indifference" and that the record did not reflect a genuine issue of material fact as to "deliberate indifference." Hence, the panel concluded that summary judgment was appropriate. The Fifth Circuit *en banc* concluded that the panel was in error in holding that there was a "special relationship" which imposed any affirmative duty on the state. The *en banc* decision never reached the question of whether or not the conduct of the official was "deliberately indifferently."

governmental programs, or quasi governmental programs, to assist persons with mental illnesses that would require such persons to affirmatively protect such mentally ill persons from harm inflicted by others or harm which such a person might inflict upon themselves.

Section 1983 imposes liability only if three things are proven: (1) that there is state action and that (2) such state action causes (3) deprivation of a constitutional right. Assuming, but not deciding that state action is implicated in this case, this Court concludes that Plaintiff has not demonstrated that there is a genuine issue of material fact either as to causation or the deprivation of a constitutional right. Plaintiff caused her own injury. That of which she complains does not implicate a deprivation of a constitutional right and even if it did Plaintiff certainly has not demonstrated any "wilful indifference" to her situation. Defendant was very attentive to Plaintiff especially after she inflicted harm on herself. While a negligent failure to assist such persons might form the basis for liability under a state law tort claim, there is no justification to further extend the Constitution in this area. The plain language of the Due Process Clause does not mandate such an extension and state tort laws do not leave such a gaping hole in tort law as to justify any such extension as a matter of substantive due process.

The judiciary from time to time has a tendency to apply legal principles as if they are mathematical formulas. One legal principle is established relating to a given constitutional provision and then a second legal precedent is grafted off the first legal principle; then another legal principle is added to the mix. Further, if all three are assumed to be controlling as to a given case, a fourth or fifth is developed and they are all combined in accordance with perfect logic. The problem is that by establishing one precept

and stacking another on top ad infinitum you ultimately reach a conclusion that is ludicrous. Such judicial pyramiding is one of the things that has caused some to question whether the law in many instances has lost touch with reality, reason and common sense.[4] The law is not a science.

While judicial interpretations should always begin, and in the opinion of this Court should usually end, after determining the literal meaning of a constitutional provision or statute, nevertheless, when judicial precedents have gone beyond literal meaning, the past legislative as well as judicial history should be considered as well as the potential consequences and effect of what another judicial extension would entail. The Fourteenth Amendment was one of the triad of constitutional amendments adopted shortly after the Civil War which were aimed at guaranteeing the liberty and civil rights of recently freed slaves. Section 1983 was intended as a mechanism for enforcing the Fourteenth Amendment. For almost 100 years the Fourteenth Amendment as well as § 1983 were narrowly construed, if construed at all.

As the cases already cited indicate, state governments for many years assumed little responsibility for the mentally ill. When states finally did assume more responsibility for the mentally ill, they did so by constructing mental hospitals and most often simply locking the mentally ill up for life. Prior to the 1970s the family of a person who suffered mental illness had basically two choices, (1) they could care for a loved one at home, if they could and if they had the inclination, or (2) they could have the loved one committed to a mental institution.

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4. *See* Philip K. Howard, *The Death of Common Sense: How Law is Suffocating America*, (1994).

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In the 1970s as courts expanded the scope of the Fourteenth Amendment, it was determined that as a general proposition, persons who suffered from mental illness could not be confined except for treatment, unless such persons were a danger to themselves or to others. *See O'Connor v. Donaldson*, 422 U.S. 563, 45 L. Ed. 2d 396, 95 S. Ct. 2486 (1975), and *Youngberg v. Romeo*, 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982). It became accepted as a constitutional principle that the mentally ill, if they were to be treated at all by the states, had to be treated in the least restrictive environment possible. Consequently, states tried to comply with this judicial interpretation of the Fourteenth Amendment by passing statutes such as Miss. Code Ann. § 41-21-73(4) (1972), which provides:

> If the court finds by clear and convincing evidence that the proposed patient is a mentally ill or mentally retarded person and, if after careful consideration of reasonable alternative dispositions, including, but not limited to, dismissal of the proceedings, the Court finds that there is no suitable alternative to judicial commitment, the court shall commit the patient for treatment in the least restrictive treatment facility which can meet the patient's treatment needs.
>
> Alternatives to commitment to inpatient care may include, but shall not be limited to: voluntary or court-ordered outpatient commitment for treatment with specific reference to a treatment regimen, day treatment in a hospital, night treatment in a hospital, placement in the custody of a friend of relative or the provision of home health services.

Id.

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As the Court in *DeShaney* explicitly pointed out, the literal language of the Fourteenth Amendment prohibits a state from affirmatively bringing about or causing a constitutional deprivation, but it does not require a state to affirmatively take action to protect its citizens. Despite the recognition by the *DeShaney* Court that the literal language of the Fourteenth Amendment only prohibited states from taking certain action and that the Amendment did not mandate any action, the Court did review prior judicial precedent in at least two types of cases which did require states to affirmatively provide certain care. These two types of cases are implicated when a state (1) locks an inmate up in prison or when a state (2) commits a mentally ill person to a mental institution. This case does not present the type of restraint which the Supreme Court and/or the Fifth Circuit concluded imposed a duty on the state to take affirmative action to protect citizens. If, as the *DeShaney Court* concluded, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause", 103 L.Ed.2d. at 259, then the Due Process Clause likewise does not mandate an affirmative duty on the part of the states to protect a citizen from herself or himself. Certainly a State has no duty under the Due Process Clause to protect a person from himself or herself when the state has exercised no more restraint over an individual than occurred in this case.

This Court has already indicated the options Deborah Randolph's family would have faced thirty or forty years ago: to either care for her themselves, or to have her locked up in an institution, In this instance, the federal government, together with the State of Mississippi — through its statutes and somewhat indirectly through the Defendant Pine Belt Mental Health, provide Plaintiff with the following: social security benefits, SSI benefits, Section 8 housing, supervision, counseling, transportation,

assistance with medication and help in general so that she can live as independently as possible and not be a burden to her family. While it is true that by the loss of her sight, Plaintiff experienced great loss and injury, the care of Plaintiff and the expenses related to her care will still be borne by the same entities that were bearing the expense and responsibility before her injury. The damages to these entities, in that Plaintiff will now require greater care and more medical attention, is not insignificant in the least.

If judicial precedents under the Fourteenth Amendment were to be extended to include this fact situation, the federal judiciary would indeed have dealt successive hammer blows to state governments under the Due Process Clause: First, the federal judiciary has already determined that states cannot institutionalize people afflicted with mental illness unless they are dangerous and unless the state affords treatment for such mentally ill in the least restrictive environment possible. Second, the judiciary, if Plaintiff's arguments were to be accepted, would in effect say to the states: "If you try to tailor a program according to the constitutional mandates we have established and care for your mentally ill in the least restrictive environment, then we will second guess you if the program we in effect have mandated has bad results. In such a situation we will further subject you to liability for damages, actual and punitive, through civil actions."

Human beings are not now and never will be perfect. Because of this, mistakes will be made. Tragic events such as that which occurred here will occur. Hindsight will always be better than foresight. What happened to Plaintiff is indeed tragic and this Court has no doubt that all involved wish it had never occurred, but that does not provide cause for the federal judiciary to expand the Fourteenth Amendment and provide civil liability in a case

such as this. The literal language of the Due Process Clause mandates no such extension, and this Court finds no other justification for such an extension.

It is worth noting that what little restraint was placed on Plaintiff in this case was by virtue of a Court order requiring her to submit to outpatient treatment to be rendered by Defendants. It is textbook law that judicial decision making is protected by absolute immunity. We have not been quite so careful in providing immunity for the actions of those outside the judiciary; and quite frequently the federal judiciary has been willing to second guess what other officials have done. But certainly the facts in this case do not demand an extension of the Fourteenth Amendment. Some might forcibly argue that persons injured under the facts of this case, or in similar situations, should have a cause of action; but if so, it should be by legislation and not by judicial expansion of the Fourteenth Amendment.

As the Court noted in *DeShaney* ". . . the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." 103 L. Ed. 2d at 263. The Court pointed out that "it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.*

The *DeShaney* Court noted that it was Joshua's father who inflicted the injury. In this case it was Plaintiff herself who inflicted the injury. This Court is of the opinion that in this case it cannot even be said that Defendants stood by and did nothing. The record indicates that they took a number of actions to try to help Plaintiff

and certainly once Plaintiff injured herself Defendants were responsive to Plaintiff.

If Courts create § 1983 liability under facts such as this, it could discourage governments from providing services such as those afforded Plaintiff. Plaintiff and others similarly situated would suffer from the absence of such programs. What happened to Plaintiff is unfortunate and this Court is sympathetic with Plaintiff problem; but the case is a prime example of why the bench and bar are criticized for creating a society that has become overly litigious. Not every unfortunate happening in life gives rise to a lawsuit.

This Court therefore finds that Defendant's Motion for Summary Judgment is well-taken and should be granted. Plaintiff's Cross-Motion is not well-taken and should be denied. Plaintiff's Motion to Amend is moot and should be dismissed. However, even if Plaintiff's Motion to Amend had been granted, it would not have affected the Court's decision as to summary judgment.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is well-taken and should be, and hereby is, GRANTED. Plaintiffs Cross Motion for Summary Judgment is not well-taken and should be, and hereby is DENIED. A separate judgment will be entered in accordance with the requirement of Rule 58j of the Federal Rules of Civil Procedure.

SO ORDERED AND ADJUDGED, this the 30th day of December, 1996

s/ Charles W. Pickering, Sr.
CHARLES W. PICKERING, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 16, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-60035

BLANCHE RANDOLPH, as Conservator of Deborah Randolph

Plaintiff - Appellant

v.

AL CERVANTES, Individually and in Official Capacity of Employee of Pine Belt Mental Health Center; MARY PHILLIPS, In Official Capacity as Employee of Pine Belt Mental Health Center; CHARLES MAIN, Individually and in his Capacity as Executive Director of Pine Belt Mental Health Center; PINE BELT MENTAL HEALTH CENTER; JAMES T CRANE, Individually and in His Official Capacity as Commissioner of Region Twelve Mental Health Commission; JACK D TRIGGS, Individually and In His Official Capacity as Commissioner of Region Twelve Mental Health Commission; GREG BRELAND, Individually and In His Official Capacity as Commissioner of Region Twelve Mental Health Commission; JOE B THOMPSON, Individually and In His Capacity as Commissioner of Region Twelve Mental Health Commission; RAY HUMPHREYS, Individually and In His Official Capacity as Commissioner of Region Twelve Mental Health Commission; LELA BUCKLEY, Individually and In Her Official Capacity as Commissioner of Region Twelve Mental Health Commission; ALFRED LOTT, Individually and In His Official Capacity as Commissioner of Region Twelve Mental

Appendix C

Health Commission; KATHY EVANS, Individually and In Her Official Capacity as Commissioner of Region Twelve Mental Health Commission; REGION TWELVE MENTAL HEALTH COMMISSION, A Body Politic

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Hattiesburg

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 12/22/97, 5 Cir., 1997, 130 F.3d 727)

Before MAGILL*, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

(–) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

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* Circuit Judge of the Eighth Circuit, sitting by designation.

Appendix C

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ illegible
United States Circuit Judge